No. 86-690

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DAVID GASAWAY, *d/b/a*
SUBURBAN SEALING COMPANY,

Petitioner,

v.

LABORERS' PENSION FUND AND LABORERS' WELFARE FUND OF THE HEALTH AND WELFARE DEPARTMENT OF THE CONSTRUCTION AND GENERAL LABORERS' DISTRICT COUNCIL OF CHICAGO AND VICINITY,

Respondents.

PETITIONER'S REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. THE QUESTIONS PRESENTED BY THE PETITION ARE SUBSTANTIAL

In opposing this Court's issuance of a writ of certiorari and insisting that the court of appeals decision below was correct, Respondents rely primarily on two arguments. First, they suggest that contractual defenses available to a promisor are unavailable against third party beneficiaries such as pension funds notwithstanding the precise opposite ruling of this Court in Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982). The nature of this opposition highlights the very problem which small businesses have in defending cases of this sort. By insisting that Kaiser Steel be read narrowly, the pension funds wish to continue the Seventh Circuit's presumption that all plan collection

activities are indefensible. This development of the law makes no accommodation for the instant case and of coercive factors stronger than those found illegal in Kaiser Steel.

Second, Respondents dispute the existence of any circuit court conflict over the question whether contract formation defenses are available to a young contractor intimidated into "signing" a pre-hire agreement. They do not believe that a difference exists between picketing activities to enforce an existing collective bargaining agreement which covers union members and picketing and other coercive activities to obtain a pre-hire agreement where it has no supporters. As demonstrated below, both arguments which advocate support for the Seventh Circuit's opinion are untenable and inconsistent with national labor policy.

II. RESPONDENTS HAVE FOUND NO CASELAW TO ARGUE THAT THE SEVENTH CIRCUIT'S DECISION IS NOT AT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

Respondents attempt to argue that prior decisions of this court hold that a promisor's "defenses against a union are not available against . . . pension funds" and therefore "duress is not a valid defense to a fringe benefit collection action." (Respondents Br. at 6). In support thereof, the pension funds primarily rely upon decisions issued before the settling decisions of Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) and McNeff v. Todd, 461 U.S 260 (1983).

In Kaiser Steel, this court ruled that union pension funds are entitled to no special status as third party beneficiaries of collective bargaining agreements and thus "are subject to the contracting defenses of non-performing

promisors" 455 U.S. at 83 n.8. Respondents deny this is the law. To do so, they rely solely and wholly on Southern California Retail Clerks Union v. Bjorklund, 728 F.2d 1262 (9th Cir. 1984). Contrary to the pension funds' reading of the case, the Ninth Circuit reaffirmed the validity of Kaiser Steel by holding that "a defense is properly allowable when it relates to a promise to make contributions that is illegal." Bjorklund, 728 Ff.2d at 1266. Bjorklund, a grocer, entered into a collective bargaining agreement with the union and made payments for himself and his son on the basis of statements made by the union that contributions for other employees were not required. The agreement stated otherwise. The Ninth Circuit found that the fraudulent inducement of a contract alone was not a defense to a collection action. Id. Consequently, the court

only considered the defense as applied to the specific pension provision of the agreement.

This finding was criticized in Operating Engineers Pension Trust v. Giorgi, 788 F.2d 620 (9th Cir. 1986)(Kozinski, J.). However, the critical observation about the issue sidestepped by the funds herein is that the Ninth Circuit in Operating Engineers v. Gilliam, 737 F.2d 1501, 1504 (9th Cir. 1984), subsequently ruled that "the surrounding circumstances and intentions of the parties are relevant to determining if a binding agreement exists."[1] The present case not only

[1]The Ninth circuit has recently added a new dimension to these labor cases by holding that a business can defend against a pension plan collection suit only where their was fraud in the execution, but may not defend where there was "fraud in the inducement." and no "meeting of the minds" Southwest Administrators, Inc. v. Rozays's Transfer, 791 F.2d 769, 774 (9th Cir.

presents a direct question of whether any contract formation defenses are available in these collection cases, but also considers the special voluntary and voidable nature of prehire agreements. Petitioner has always asserted that an "agreement" was never entered into and if one was, it is void ab initio on account of duress, a legal point none of these cases have considered. Only the court below has determined that these defenses are not available.

The pension funds argue in the same breath that the existence of union strikes or picketing have uniformly been rejected as evidence constituting duress. Every case cited by the funds predate McNeff v. Todd, and have therefore no

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1986). This development highlights the urgent need to clarify the prevailing rule of law to ensure uniform application.

effect on this case.[2] In McNeff, the Court reaffirmed its decision that prehire agreements were to be entered into only voluntarily. 461 U.S. at 268. The Court also noted that "[i]f, however, an employer could be compelled by picketing to treat a minority union as the exclusive bargaining agent of employees, the § 7 rights of those employees would be undermined to an extent not contemplated by Congress." Id. The paucity of support for the Seventh Circuit's decision that there was an intended contractual execution is highlighted by respondents' retreat to these citations.

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[2]They are: Lewis v. Benedict Coal, 361 U.S. 459 (1960); Lewis v. Owens, 338 F.2d 740 (6th Cir. 1964); Lewis v. Mill Ridge Coal, 188 F. Supp. 4, aff'd, 298 F.2d 552 (6th Cir. 1962); Carpenters Welfare & Pension Fund v. Dombrowski, 545 F. Supp. 325 (N.D. Ill. 1982).

III. PICKETING AND THREATS TO OBTAIN A PREHIRE AGREEMENT ARE AGAINST PUBLIC POLICY

Finally, the pension funds argue that Kaiser Steel provides only a limited defense to making trust contributions and only where the "very act of making the contributions would be intrinsically unlawful." (Respondents Br. at 8). This argument has no previous basis in the record or decision below and further demonstrates how the Seventh Circuit decision is reinforcing a misconception about this Court's prior rulings on these labor issues.

The pension funds and the court below failed to comprehend the distinction between the ability of a union to picket to enforce or obtain a collective bargaining agreement where it is already recognized as the majority representative and picketing to obtain an agreement where it has no majority status. Again,

this distinction was expressly addressed in McNeff: "Allowing a union to picket to enforce a prehire agreement before it attains majority status is plainly inconsistent with the voidable nature of a prehire agreement." Id. at 269. This difference is well recognized; picketing to obtain a prehire agreement is the use of coercion prohibited by § 8(f). NLRB v. Local 542, IUOE, 331 F.2d 99, 106 (3d Cir. 1964), cert. denied, 379 U.S. 889 (1964); NLRB v. Hod Carriers, 285 F.2d 397, 403 (8th Cir. 1960), cert. denied, 366 U.S. 903 (1961).

At bar there is no question that several unions picketed David Gasaway's jobsite. The pension funds for the first time allege that this was area standards picketing only. (Respondents Br. at 13). The facts belie this ludicrous statement, for it is uncontested that the laborers' union and its business agent did more

than just advise the public of a non-union employer, both induced and wanted Gasaway to sign a contract. See Petition, Statement of the Case, p. 8. Moreover, at no point has petitioner "concede[d]" that duress could not be established here on these facts. See Respondents' Br. at 6.

Failure to consider whether or not area standards picketing could "constitute coercive pressure or duress," Br. at 13, reflects the pension funds' and Seventh Circuit's problem here. That is, picketing of itself is coercive, but picketing combined with organizing threats and pressure to sign prehire agreements is exactly the form of illegal pressure contemplated by Congress when it required that these agreements be voluntarily executed. See 104 Cong. Rec. 11308 (July 16, 1958)(Statement of Senator Kennedy).

IV. IT IS AGAINST PUBLIC POLICY TO ENFORCE AN "AGREEMENT" THAT EXISTS ONLY TO COVER-UP ILLEGAL RACKETEERING ACTIVITY

The funds also proceed on the basis that § 8(f) prehire agreements should be treated as akin to § 8(e) subcontracting agreements in reviewing their lawfulness. However, they are alike as apples are to oranges. § 8(e) subcontracting agreements are permissible in the construction industry when a union enjoys majority status. Since they derive from otherwise legitimate collective bargaining agreements, if the provision is found illegal, only the provision is void and unenforceable. The remainder of the contract stands. Kaiser Steel.

However, the applicable question in the § 8(f) context is whether the agreement itself is legitimate and enforceable because it was voluntarily entered into. If not, the entire contract has no

existence. If it is valid, then all terms are enforceable. These distinctions are fundamental.

Remarkably, the pension funds claim that since petitioner failed to file an unfair labor practice charge with the National Labor Relations Board, consideration of the validity of the § 8(f) is foreclosed. As could be anticipated, no counter argument is made to petitioner's point that it would be futile and illogical to file a charge with the Board in order to void an agreement a contractor does not believe exists. See Petition at 33.

The illegality issue was raised by petitioner in his First Opposition to Summary Judgement not in his motion to reconsider, but this has been overlooked by the pension funds. The violation of 29 U.S.C. § 186 ("§ 302, LMRA") is more than a "technical violation" of the

statute. As the pension funds concede, money was paid by Gasaway to the union without employee knowledge.

Hidden transactions were intended to be forbidden by § 302. The requirement that money may only be transferred with employee consent in certain circumstances to employee representatives was carefully chosen by Congress. This court recently refused the opportunity to consider an alternate view in Trailways Lines, Inc. v. Trailways Inc. Joint Council, 785 F.2d 101, 104 (3d Cir. 1986), cert. denied, 55 U.S.L.W. 3310 (No. 86-400, 1986 Term). That case held that "[p]ayments to trustees administering a pension trust are payments to an 'employee representative'" for purposes of § 302, and therefore could be illegal.

All financial transactions are prohibited by § 302, except as provided in the statute. The gimmick used by the

Laborers' union against Gasaway is for the same behavior in which its agent was convicted in United States v. Gruttadauro, No. 85-CR-731-1 (N.D. Ill. 1985), on appeal No. 86-1722 and 86-1874 (7th Cir. 1986). The facts are indistinguishable. A copy of the judgment is attached in the Appendix hereto.

The racketeering issue raised by the petitioner is that in evaluating an illegal contract under § 302 as in Kaiser Steel, the federal courts must account for the public interests involved in the matter and choose the position which follows that policy. The Seventh Circuit and the 5,000 plus cases now docketed in the federal judicial system establish that the lower courts are making up the law of labor contract formation and contract defenses as they go along regardless of the equities involved. In

considering whether illegality is present here, the Court should consider whether any defense is sufficient to preclude enforcement of labor agreements as it said in McNeff, an § 8(f) case as is the instant one.

CONCLUSION

The inevitability of recurring litigation over this issue petitioner predicts will continue until this Court resolves the dispute. For this reason and those stated in the petition, petitioner respectfully requests that the Writ of Certiorari be granted.

Respectfully submitted,

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December 4, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	No. 85 CR 731
	)	
SALVATORE GRUTTADAURO	)	

MEMORANDUM OPINION AND ORDER

Salvatore Gruttadauro, a union business agent, was convicted by a jury on all counts of a four count indictment, charging him with willfully receiving money from an employer in violation of 29 U.S.C. § 186(b)(1) and (d). Gruttadauro moved for judgment of acquittal pursuant to Fed. R. Crim. P. 29 at the close of the government's case. The court now denies that motion as well as the two post-trial motions.

Turning first to the Rule 29 motions, Gruttadauro argues that there was insufficient evidence from which a jury could have found him guilty beyond a

reasonable doubt. The standard to be applied to these pre-verdict and post-verdict motions is the same:

> [T]he test the court must use is whether at the time of the motion there was relevant evidence from which the jury could reasonably find [the defendant] guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the Government . . . bear[ing] in mind that 'it is the exclusive function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences.'

United States v. Marquardt, No. 85-1318 slip op. at 15 (7th Cir. Feb. 28, 1986)(quoting United States v. Beck, 615 F.2d 444, 448 (7th Cir. 1980)). A review of the record shows that the government introduced sufficient evidence to meet this test.

William Hack and Associates, Inc., a corporation located in Bensenville,

Illinois, was an employer of employees who were involved in the restoration of buildings in the Chicago area. William Hack was owner and chief officer of the corporation. Hack testified that, beginning in October, 1977, representatives of various unions began putting pressure on Hack to employ union workers. Hack testified that he had no intention of having his workers join unions, but he did want the unions to "get off his back." He therefore contacted defendant, the business agent for Local No. 1, to see if defendant could help him out. Defendant and Hack met in October 1977, during which time they discussed Hack's problem. As a result of the meeting, defendant sold Hack four union cards. Hack also testified that defendant urged him to sign a union contract with Local No. 1, but he told defendant he did not want to

sign at that time. Defendant sold Hack the cards anyway.

Nothing happened for four years. No union official from Local No. 1 ever visited Hack's job site. No Hack employees paid periodic union dues, and no one from Local No. 1 attempted to collect any dues. Then in the Spring of 1981, Hack was again harassed by union personnel to employ union workers. Hack again contacted defendant to get help. Defendant once more sold union cards to Hack. Defendant renewed his suggestion that Hack get his employees into Local No. 1 , but Hack refused. Defendant sold him more cards anyway. As in 1977, no one from Local No. 1 ever visited Hack's job site. None of Hack's employees paid union dues and Local No. 1 made no attempt to collect any dues. Also, as before, defendant made no further

attempts to get Hack to sign a contract with Local No. 1.

This scenario was repeated twice more, in the Spring of 1982 and in the Fall of 1982. On both occasions, Hack was harassed by unions so he contacted defendant. Defendant sold him more cards without Hack ever signing a contract with Local No. 1.

The union records showed that Gruttadauro turned over to Local No. 1 most of the more than $3,000 Hack paid for the cards between 1977 and 1982. But the records also support the government's contention that defendant knew Hack's employees were not members of Local No. 1 and were never intended to be. For example, Local No. 1 kept an official membership ledger which recorded the name of each member along with his assigned membership number. None of the Hack employees whose names appear on the cards

sold to Hack are listed in the ledger book. Moreover, the Union member's number is supposed to be affixed to his card. The numbers affixed to the cards sold to Hack failed to match the numbers in the ledger books. Next to the ledger book numbers that were supposed to belong to Hack's employees, were the names of unknown persons.

The government presented further evidence that defendant knew Hack's employees were not members of Local No. 1. The international union to which Local No. 1 belongs, the Laborers' International Union of North America, AFL-CIO ("International"), extracts from each local a per capita tax on each of the local's members. But the International never received any per capita amounts for the Hack employees who were supposed to be members of Local No. 1.

Gruttadauro's explanation for all this was that he was fooled by Hack. Counsel argued that defendant was under the impression that he had an oral collective bargaining agreement with Hack on all the occasions on which he received money for cards. But the jury could reasonably find this explanation incredible given the five-year span over which this activity took place, and most importantly, given defendant's twenty-nine years of experience as a business agent for Local No. 1. For these reasons the court finds that the evidence was sufficient, both at the close of the government's case in chief and at the end of the entire case, to support a jury finding of guilt beyond a reasonable doubt.[1]

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[1]The government's rebuttal evidence added very little to its case in chief. Thus, the same evidence which supported the jury verdict had been introduced at

Next defendant seeks an arrest of judgment. He contends that the indictment does not charge an offense. In a pre-trial motion defendant made this same argument. For the reasons discussed in the court's prior resolution of this issue, the motion is denied. See, Memorandum Opinion and Order, March 11, 1986.

In conclusion, defendants [sic] two motions for judgment of acquittal under Rule 29 are denied. The Rule 34 motion is also denied.

E N T E R:

/s/ Ann Claire Williams
Ann Claire Williams, Judge
United States District Court

Dated: April 21, 1986

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the time of the Rule 29(a) motion at the end of the government's case.